

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, *ET AL.*,

Plaintiffs,

v.

ENRON CORPORATION, *ET AL.*,

Defendants.

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CIVIL ACTION NO: H-01-3624
AND CONSOLIDATED CASES

**RESPONSE TO MOTION OF MICHAEL J. KOPPER, *ET AL.*
TO QUASH THE SUBPOENA ISSUED BY
THE 21ST JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY
AND REQUEST FOR ORAL HEARING**

TO THE HONORABLE MELINDA HARMON, U.S. DISTRICT JUDGE:

COME NOW Jane Bullock, *et al.*, Plaintiffs in the 21st Judicial District Court of Washington County, Texas, with this their response to the motion to quash the subpoena issued by the 21st Judicial District Court of Washington County, Texas and would show the Court the following as support thereof:

1. The Plaintiffs in Washington County are residents of that county, have a state law cause of action, an equitable claim unlike the federal class action and an action under the Fraudulent Conveyances Act of the State of Texas for which they seek injunctive relief. Plaintiffs do not seek relief in federal court nor do they wish to be part of the federal class action controlled by large out-of-state institutions. Plaintiffs' claims were reviewed by a federal district judge sitting in the Western District of Texas, the district in which Washington County lies. The court remanded the case to the 21st Judicial District Court as Plaintiffs' claims did not assert a federal question.

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2. Plaintiffs issued the subpoena for the records of LJM II and others to Joseph L. Trahan, president/CEO of Distributive Network Services Corp., because Plaintiffs' counsel and staff had been advised that if a subpoena were not issued in order to protect the documents, the documents which were important to this litigation would most likely disappear, be altered, or be removed beyond subpoena range. Based on that information from a credible source who is a member of the Bar of the State of Texas, Plaintiffs have sought for over two months to protect these documents so that they might be reviewed by the court and other counsel in the litigation involving the off-the-books partnerships. These transactions, which were known to Mr. Lay, but not disclosed by him in his speech in Washington County in October 2000, are crucial to Plaintiffs' claims that Lay made false representations in his October 2000 speech. Once the records that are covered by the subpoena were disclosed in part in October 2001, the price of Enron's shares began a precipitous decline.

3. It is understandable why Mr. Kopper would want to keep these documents from being discovered, since the documents have been represented to be incriminating so far as Mr. Kopper and his "domestic partner" are concerned. Plaintiffs' counsel has not yet seen the documents, but has only had them explained in general terms by counsel for Mr. Trahan and the attorney who disclosed their existence. Plaintiffs request a hearing in order to be able to show the importance of these documents and the reasons causing the Washington County Plaintiffs to issue a subpoena to protect these records for themselves and others before they disappeared. The Washington County Plaintiffs would also request that they be allowed to prove at an oral hearing that their law firm was advised that the records were in imminent danger of being lost if a subpoena was not served immediately to protect them.

4. Plaintiffs believe that the court in the 21st Judicial District of Washington County, Texas has a legitimate interest in reviewing the documents and having them presented and preserved in that forum for that case. If the parties in the federal action do not wish to preserve them in this action, this Court should not interfere with a legitimate subpoena issued by the clerk of the Washington County court in a case determined by another federal judge to belong in state court.

5. The subpoena in question has been issued pursuant to the agreement between G. Sean Jez, attorney for Plaintiffs in Washington County, and Eric Nichols, attorney for Mr. Kopper, who is not a party in Washington County. Plaintiffs are no longer seeking production of the documents in question in the federal action, but only in the 21st Judicial District Court in which an injunction hearing is scheduled for May 3, 2002, and a trial is scheduled for March 3, 2003. Plaintiffs in Washington County need the documents in order to be able to prepare their state law causes of action for trial and to be able to prove their case.

6. Plaintiffs in Washington County presently number only twenty-two because that is all of the Plaintiffs who have hired Fleming & Associates in that county, not because of artful pleading. However, one more resident of Washington County with a substantial investment in Enron has requested to join the suit. An amendment to include the twenty-third individual has not yet been prepared.

7. Plaintiffs have a legitimate right to prosecute their state law causes of action and have joined all others similarly situated to bring those claims. In order to develop their claims, they seek to preserve and protect evidence from destruction by persons who might have a vested interest in seeing that the documents which are the subject of the subpoena in question are never

revealed. Plaintiffs request an oral hearing in order to be able to voice their concerns and present evidence.

8. If Mr. Kopper and others have a legitimate claim that the subpoena from the 21st Judicial District Court should be quashed, they should bring their objections in the court that issued the subpoena, not in this Court which involves different parties and claims.

9. The Plaintiffs in Washington County seek redress for false and fraudulent representations made in October 2000 in Brenham, Texas. They do not seek redress against many of the defendants named in the federal class action.

10. The Plaintiffs in Washington County will be deprived of their legitimate right to discovery in order to be able to have a fair trial pursuant to the Texas Rules of Civil Procedure if the injunction sought by Mr. Kopper is granted and the subpoena is quashed.

11. The Washington County Plaintiffs are not seeking derivative relief, but relief only for their own losses suffered in that county because of the false and fraudulent representations of Kenneth L. Lay and the actions or inactions of the other defendants in that suit. Many of the Plaintiffs in Washington County no longer even own Enron stock and could not seek derivative relief. Ours is a federal system allowing cases in both state and federal courts. The Washington County Plaintiffs wish to have their claims resolved in their home county without interfering with the federal action.

12. The relief requested by Mr. Kopper would violate the longstanding principles of federalism upon which our governmental system is based. *See Younger v. Harris*, 401 U.S. 37, 44 (1971).

13. Mr. Kopper has not made a “proper showing” that a stay of this subpoena is necessary to either (1) aid the jurisdiction of this Court or (2) effectuate a judgment in this Court.

The power of this Court to stay discovery in a state court proceeding is quite limited. *See Tobias Holdings, Inc. v. Bank United Corp.*, 177 F. Supp. 2d 162, 168 (S.D.N.Y. 2001). This state court action will not and has not interfered with the federal class action in order to justify a stay of discovery in Washington County.

14. The judge of the 21st Judicial District Court has been fully advised of the pendency of the federal class action and has taken great pains to avoid interfering with the schedule set by this Court. The schedule in the 21st Judicial District Court at this time does not interfere with the schedule of the class action.

15. Kopper cites no case law under SLUSA supporting his position that this Court can or should quash a subpoena issued by a state court in an individual action rather than a class action. Plaintiffs, by contrast, have presented the court with two decisions, including one from the Northern District of Texas earlier this month, that contradict Kopper's attempt to block discovery in an individual state court action through an appeal to a federal court under SLUSA. Like the other Defendants, Kopper is inviting this Court to commit error.

WHEREFORE, Jane Bullock, *et al.* pray that this Court deny the relief requested by Mr. Kopper, *et al.* and require those parties to take their complaint regarding the subpoena in question to the 21st Judicial District Court of Washington County, Texas.

Respectfully submitted,

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* signed by permission

Sylvia Davidow

CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the above and foregoing has been provided to all parties as indicated on the attached Service List on this the 26th day of April, 2002, by e-mail pursuant to Court order, or by facsimile or first class mail:

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